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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

THE UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

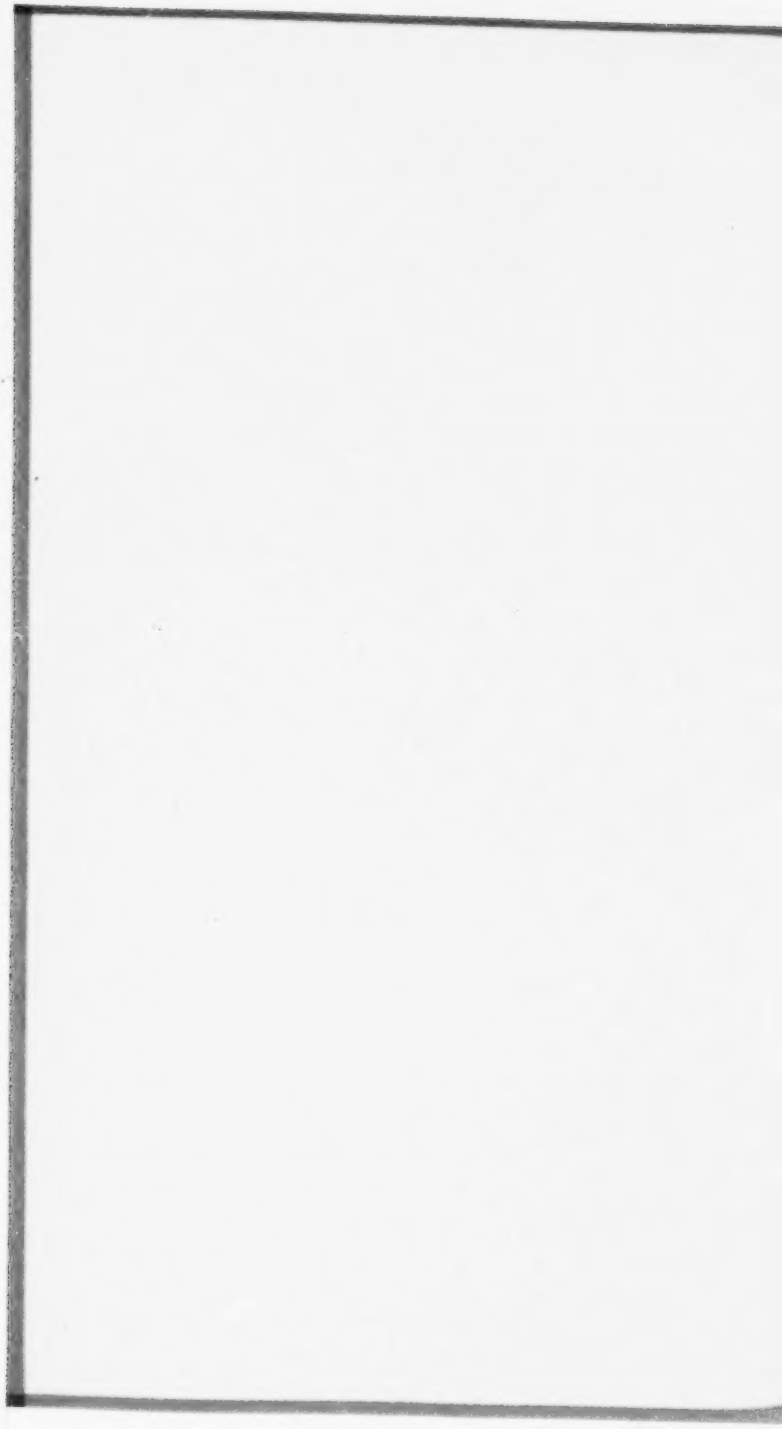
L. C. RUSSELL,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

OTTO CHRISTENSEN,
ATTORNEY FOR DEFENDANT IN ERROR.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.



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ARGUMENT.

The first count of the indictment charges that the defendant "did corruptly endeavor to influence one William D. Russell," summoned to attend as a petit juror in the District Court on the 3rd of April, 1918, "in the discharge of his duty as such petit juror." And the second count of the indictment charges that the defendant "did corruptly influence, obstruct and impede the due administration of justice in said District Court."

The facts recited in the indictment to sustain these two charges were that the defendant, two days prior to the day that the prospective petit juror had been summoned to attend the District Court, called at his home and there met his wife, with whom he had a conversation as follows: First, he requested her to question her husband

as to his attitude toward one William D. Haywood and his co-defendants and report the result of such questioning to him, and, secondly, he further stated to the wife "they did not want to pay money to any of the petit jurors * * * unless they knew such petit jurors would favor their acquittal." The Court below in its certificate of opinion (Rec. 8) states "I was of the opinion that there was no statute of the United States making the matters charged in the indictment a crime."

The foregoing conversation, which forms the basis of the charge, upon analysis, shows, *first,* it was had with a third person and not the juror; *second,* the request to the third person was that she *only* question the prospective juror as to his "attitude" toward said Haywood, *et al.* There was no direction to do anything further than to find out what his attitude was towards the defendants. The third person was not authorized or requested to approach the juror in any way; *third,* the statement that "they did not want to pay money to any of the petit jurors * * * unless they * * * would favor their acquittal" was only a communication to a third person and, as is alleged in the indictment, was assigned as the reason for the defendant desiring to ascertain the attitude of the petit juror toward *Haywood, et al.*

The query to our mind, then, is, are the offenses charged in the indictment established by facts that a defendant *solicited a third person* to interrogate a prospective juror as to his attitude toward certain defendants because "they" (the defendants) did not want to pay money to jurors unfavorable to an acquittal? Does this constitute an "attempt" or "endeavor" on the part of such person to commit the crime charged? As we view it, this only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation. It stands here as the bare representa-

tion to a third person to act for this defendant in ascertaining the juror's attitude toward certain defendants, and not accepted. By the most strained construction this could be interpreted only, and this we seriously question, to be *preparation* for an "endeavor" or "attempt" to influence the juror, but falls far short of an actual endeavor to do so.

Bouvier, Volume I, Edition 1897, page 190, contains the following definitions of "attempt" and "endeavor":

> "**Attempt in Criminal Law.** An endeavor to accomplish a crime *carried beyond mere preparation but falling short of execution of the ultimate design in any part of it.*" (5 Cushing 367; 26 Ga. 493).
>
> "An act *immediately* and *directly* tending to the execution of the principal crime and committed by the person under such circumstances that he has the power of carrying his intention into execution." (1 Bishop Criminal Law, 749).

In the case of *People* v. *Murray* (14 California 159), a case frequently cited by the courts, Chief Justice Field said:

> "It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. *Between preparation for the attempt and the attempt itself, there is a wide difference.* The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation, he may be held to keep the peace; but he is not chargeable with any attempt to kill. So in the present case, the declarations, and elopement, and request for a magistrate, were preparatory to the marriage; but until the officer was engaged, and the parties stood before him,

ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. *The attempt contemplated by the statute must be manifest by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party.*" (Italics our own.)

In the case of *United States* v. *Stephens* (12 Fed. 52), it was held that a person resident in Alaska who ordered one hundred gallons of whiskey to be shipped to him in Alaska by a wholesaler dealer in San Francisco, who had the whiskey on hand and for sale, with intent to introduce the same into Alaska, was not guilty of an attempt, under Section 20 of the Act of June 30, 1834, making it a crime to attempt to introduce spirituous liquors or wine into Alaska. At Page 54 the Court said:

"There are a class of acts which may be fairly said to be done in pursuance of or in combination with an intent to commit a crime, but are not in a legal sense a part of it, and therefore do not with such intent constitute an indictable attempt; for instance, the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are considered in the nature of *preliminary preparations*—conditions, not causes—and, although co-existent with a guilty intent, are indifferent in their character, and do not advance the conduct of the party beyond the sphere of mere intent. They are, it is true, the necessary conditions, without which the shooting or poisoning could not take place, but they are not in the eye of the law the cause of either. 1 Whart. Crim. Law, Sections 178, 181; 1 Bish. Crim. Law, Section 668 et seq.; *People* v. *Murray*, 14 Cal. 160. (Italics our own.)

Dr. Wharton says (*supra*, Section 181): 'To make the act an indictable attempt it must be a *cause*, as distinguished from a *condition;* and it must go so far that it would result in the crime unless frustrated by extraneous circumstances.' "

In the case of *Hicks* v. *Commonwealth* (86 Va. 223), the charge was an attempt to administer poison. Justice P. Lewis, in delivering the opinion of the Court, said: (Italics our own.)

> "The principal witness for the commonwealth was Mrs. Laura Long, whose uncontradicted evidence is substantially as follows: That on several occasions, at the house of the witness in Pulaski County, the first being on the 31st of August, 1888, the prisoner spoke to her about poisoning 'old man Anderson,' and said he knew Mrs. Price would approve it, as she had proposed to him (Hicks) to poison him.
>
> On the 18th of September the prisoner passed the house of the witness on his way to Central to get the poison, saying to her as he passed, that Mrs. Price had given him the money to buy it with. On his return, he stopped at the house of the witness and showed her the poison he had purchased. It was wrapped up in a paper, which was inside of an envelope, 'which had on it a skull and bones and reading.' It was strychnine, and he said he had gotten it that day at a drug store at Central. He told the witness he wanted her to go with him to the spring, near by, where Mrs. Price would meet them and deliver the poison to her and tell her all about it. The witness said she could not go then, but would meet them there that night about 8 o'clock, if that would suit. To this the prisoner answered that it would suit a great deal better, and that he would be present to see the poison delivered and to witness the agreement. He then went on his way.
>
> The witness went to the spring at the appointed hour, and after waiting there a little while Mrs. Price arrived. She had a small package in one hand, which she said contained strychnine, and an envelope in the other. The package she handed to the witness saying, 'here it is.' She then directed the witness to put the poison in the old man's coffee that night when she got home, and told her as soon as he got 'passed speaking and dropped' to give the alarm, and to say that the old man had fallen dead; for all which she offered to reward her liberally. She said George (the prisoner) was 'right out there,' pointing in the direction of the corn-field. The witness

looked and saw some one there, and called the prisoner, but he did not answer. Just then, at a signal from the witness, several men, in hiding near by, rushed up, and Mrs. Price ran away, and the witness delivered to one of these men (a Mr. Brown) the package of poison she had just received from Mrs. Price. The witness also testified that she never agreed to administer the poison, and never intended to do so, and that she would not have done it for anything. 'I wanted to fool Hicks,' she said, 'because I wanted to catch him and to let other people know it.'

The connection of the prisoner with the matter, as detailed by Mrs. Long, is fully established by the record, and the question, therefore, is whether these facts constitute an indictable attempt within the meaning of the law. We are of opinion that they do not, and as they substantially correspond with the allegations of the indictment, it follows that the demurrer to the indictment ought to have been sustained. It is an elementary rule of criminal pleading that an indictment in a case like the present must allege some act done by the defendant of such a nature as to constitute an attempt, in a legal sense, to commit the contemplated offence, otherwise the indictment will not be sufficient. *Clark's case*, 6 Gratt. 675; 1 Whart. Crim. Law (9th Ed.), Sec. 192.

The question as to what is such an act, is often a difficult one to determine, and no general rule, which can be readily applied as a test to all cases, can be laid down. It has been truly said by a philosophical writer that the 'subject of criminal attempt, though it presses itself upon the attention wherever we walk through the fields of the criminal law, is very obscure in the books, and apparently not well understood either by the text-writers or the judges.' And it may be added that it is more intricate and difficult of comprehension than any other branch of the criminal law. Each case must, therefore, be determined upon its own facts, in the light of certain principles which appear to be well settled. The difficulty generally is in determining the proximity of the act in question to the offense in contemplation.

An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct, ineffectual act done towards its commission.

Code, Sec. 3888; 2 Bish. Crim. Prac., Sec. 71. Or, as Wharton defines it, 'an attempt is an intended apparent unfinished crime.' *Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory.* In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense *after the preparations are made. Uhl's case,* 6 Gratt., 706; *McDade* v. *People,* 29 Mich. 50.

Thus, it has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offence, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. 'To make the act an indictable attempt,' says Wharton, 'it must be a *cause* as distinguished from a *condition.* And it must go so far that it would result in the crime unless frustrated by extraneous circumstances.' 1 Whart. Crim. Law, Sec. 181.

This is well illustrated by the case of *People* v. *Murray,* 14 Cal. 159. In that case the defendant was indicted for an attempt to contract an incestuous marriage with his niece. It was shown that after declaring his intention to marry her, he actually eloped with her, and sent for a magistrate to perform the ceremony, and at the trial he was convicted. But on appeal, the judgment was reversed, the Appellate Court holding that these were mere preparations, and did not constitute an attempt within the meaning of the statute. * * *

The same principle was recognized by the Supreme Court of Pennsylvania in a recent case, and one which bears a striking resemblance to the case before us. There the defendant was indicted and convicted for an attempt to administer poison, under a statute the provisions of which are substantially the

same as those of our own statute. It was proved at the trial that the defendant, in a conversation with a witness, Neyer, stated his grievance against his intended victim, Waring, and his determination to be revenged, and then solicited Neyer to put poison in Waring's spring, so that he and his family would be poisoned, offering him a reward therefor. He also gave him directions how to administer the poison, and gave him the poison to be administered. But the witness refused to have anything to do with it, and handed it back to the defendant, and testified that he never intended to administer it.

Upon these facts the Supreme Court held that all that occurred at the interview with the witness and the legal inferences deducible therefrom, followed by no other act, were not sufficient to warrant a conviction for an attempt to commit the felony charged; that the act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it within the meaning of the statute, and the judgment was accordingly reversed. 'Merely soliciting one to do an act,' said the Court, 'is not an attempt to do that act. * * * In a high, moral sense, it may be true that solicitation is an attempt; but in a legal sense, it is not. *Stabler* v. *Commonwealth*, 95 Pa. St. 318.'

The Court, in its opinion, also referred to the case of *Regina* v. *Williams*, 1 Cor. and K., 589 (S. C. 1 Den., C. C., 39), which was a prosecution under the third section of the Act of 1 Victoria, from which the Pennsylvania Statute was substantially copied; and in that case it was held that the delivery of poison to an agent, with directions to him to cause it to be administered to another, was not sufficient to establish an attempt to murder. In that case the agent was actually given money for his services, and immediately proceeded with the poison to the house of the intended victims; but upon his arrival there he gave up the poison to them, and told them all about it. The prisoners were convicted, but at the ensuing term the case was considered by the fifteen judges, who held the conviction wrong.

The application of these principles to the facts of the present case shows very clearly, we think, that the judgment is erroneous. Here, undoubtedly,

there was an intent to commit murder; but the acts done do not amount to anything more than the mere arrangement of the proposed measures for its commission. They were nothing more than mere preparations, and even the intended preparations were not completed before the criminal design was frustrated. The means intended to be employed to consummate the offense were: first, the purchase of poison, and, secondly, the delivery of the poison to an agent, to be by her administered. But as the party to whom the poison was delivered refused to administer it, or to do any act in furtherance of the design, there has been no direct act done towards the commission of the offense, and, consequently, no attempt, in a legal sense, to commit the crime has been established. In other words, the acts proved, no matter how, in a moral point of view, they may be regarded, do not, in the eye of the law, approximate sufficiently near to the commission of murder to advance the conduct of the prisoner beyond the sphere of mere intent.

That the mere delivery of poison by one person to another, for the purpose disclosed by the record in the present case, does not constitute an attempt to administer poison within the meaning of the statute is clear, we think, because it is not such an act as is likely, in the natural course of events, to bring about the result desired. On the contrary, the presumption in such a case is the other way, since a criminal intent on the part of the person to whom the poison is delivered, is not to be presumed, and hence, for this reason, if no other, the act of delivering the poison is not such an one as can be considered a judicial cause, or a direct step in the actual endeavor to commit a crime—without which there can be no attempt within the meaning of the statute. 1 Whart. Crim. Law (9th Ed.), Sec. 178.

We are, therefore, constrained to hold that the conviction is wrong, and that the judgment must be reversed and the demurrer to the indictment sustained."

In the case of *Groves* v. *The State*, 116 Ga. 516, the defendant was indicted for an attempt to commit robbery, it being alleged that the accused in such attempt did do an

act towards the commission of said crime, by hiring a hack for the purpose of assisting them in the commission of the crime, by ascertaining that the intended victim of the robbery had no weapons of defense, and by procuring false faces for the purposes of a disguise. The Court said, through Justice Fish:

> "We think the demurrer should have been sustained. The indictment was based upon the Penal Code, Section 1040, which declares that 'If any person shall attempt to commit a crime, and in such attempt shall do any act towards the commission of such crime, but shall fail in the perpetration thereof, or shall be prevented or intercepted from executing the same, he shall, in cases where no provision is otherwise made in this Code, or by law, for the punishment of such attempt, be punished as follows,' etc. In order to constitute the offense of attempt to commit a crime, the accused must do some act towards its *commission*. Commission means the act of committing, doing, or performing; the act of perpetrating. Webster's Dict. Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it."

In the case of *People* v. *Youngs*, 122 Mich. 292, it was held that the defendant could not be convicted of an attempt to break and enter a dwelling house upon evidence merely that he left his home and met, by pre-arrangement, a supposed confederate at a saloon on the way to the dwelling, and after loading his revolver there and procuring extra cartridges for it, went to a drug store and bought chloroform, which, with carpet slippers and the weapon, was found on his person by officers who arrested him. Justice Montgomery, in his opinion says:

> "Two questions present themselves: (1) Does the statute in question change the common-law rule as to what constitutes an attempt to commit an offense? (2) If not, whether the facts stated show an attempt, as defined at the common law. In my opinion, both these questions should be answered in the negative.

The statute, in terms, relates to attempts to commit a crime, and, to make the intent still more certain, provides that, before the offense shall be complete, the accused shall do some act towards the commission of such offense. This does not eliminate any of the elements of the common law offense of attempt to commit crime. On the contrary, it enumerates them. To constitute an attempt, at the common law, something more than an intention or purpose to commit crime is necessary. As was said by Field, C. J., in *People* v. *Murray*, 14 Cal. 159:

'Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations are made.'

In *Reg.* v. *Taylor*, 1 Fost. & F. 512, the chief baron said:

'The act, to constitute a criminal attempt, must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature.'

See also, *McDade* v. *People*, 29 Mich. 50; *Hicks* v. *Com.*, 86 Va. 223 (19 Am. St. Rep. 891); *Reg.* v. *McCann*, 28 U. C. Q. B. 514; *Stabler* v. *Com.*, 95 Pa. St. 318 (40 Am. Rep. 653); *Com.* v. *McDonald*, 5 Cush. 367; *Griffin* v. *State*, 26 Ga. 493; *People* v. *Machen*, 73 Mich. 27; 3 Am. & Eng. Enc. Law (2nd Ed.), 266."

In the case of *State* v. *Hurley*, 79 Vt. 29, it was held that the mere fact that a prisoner, lawfully in jail, arranged for procuring saws adapted to jail breaking and thereby got them into his possession, with the intent therewith to break open the jail for the purpose of escap-

ing, did not constitute an attempt to break jail. Justice Munson in delivering the opinion of the Court, said (p. 33):

> "The act in question here is the procuring by a prisoner of tools adapted to jail breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design."

In the case of *Patrick* v. *The People*, 132 Ill. 529, Justice Scholfield in delivering the opinion of the Court, said:

> "The conviction is claimed to be under Section 87 of the Criminal Code (Rev. Stat. 1874, Chap. 38, p. 364), which reads thus: 'Whoever sets at liberty or rescues, or attempts to set at liberty or rescue, a person charged with the commission of any capital offense or crime punishable by imprisonment in the penitentiary, before the conviction of such person, shall be imprisoned on the penitentiary not exceeding five years, and fined not exceeding $1,000.' The ques- therefore necessarily arises, what constitutes an 'attempt to set at liberty' a prisoner? The statute does not define 'an attempt,' and we must hence resort to the common law to ascertain what, in a legal sense, is its meaning. Bouvier, in his dictionary (Vol. 1, p. 138), says: 'An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation but falling short of execution of the ultimate design, in any part of it.' And Wharton says:
>
> 'To make the act an indictable attempt, it must be a *cause*, as distinguished from a *condition*.' 2 Crim. Law (7th Ed.), Sec. 2693. See, also, *People* v. *Mur-*

ray, 14 Cal. 159; *Griffith* v. *State*, 26 Ga. 493. Since the mere delivery of the saws, knives and file to Green Patrick, manifestly, could not open any way of escape from the jail, it is plain that there is no relation of cause and effect between that which Jackson tried to do, and that which the indictment charges and the jury found was attempted. The saws, knives and file were only implements or tools that might be used in effecting an opening in the jail, and procuring and attempting to deliver them to Green Patrick was therefore simply attempting to prepare for an attempt to make an escape. They were means, or, adopting the language of Wharton, 'conditions,' in making an attempt to escape."

It will thus be observed that to constitute an "attempt" or "endeavor" to influence a juror, it is necessary to show not only that that was the defendant's purpose, but that he performed some acts beyond *mere preparation* which would "amount to the commencement of the consummation." The foregoing cases are much stronger on the facts than the present one, in which we have only an unaccepted solicitation of a third person to ascertain a juror's attitude towards men held for trial; if we are to assume that the defendant here had in mind, upon receiving information that the juror was not hostile to the men about to be placed on trial, to "corruptly endeavor to influence" such juror, his conduct amounted to nothing *but preparation for the "endeavor."* Between the two—preparation for the endeavor and the endeavor itself to influence a juror—there is a wide difference. *People* v. *Murray*, *supra*.

As Chief Justice Holmes in delivering the opinion of the Court in the case of *Commonwealth* v. *Kennedy* (170 Mass. 22), cited by the Government, said:

> "The aim of the law is not to punish sins, but is to prevent certain results, and the act done must come pretty near to accomplishing that result before the law will notice it."

This case, on the facts, is not as counsel assumes it to be when he argues at page 22:

> "Sounding a juror as to his susceptibility to bribery is an 'endeavor' to 'influence' him, though nothing more be done, for it is an endeavor to muddy the waters, which is sufficient."

Conceding, for the sake of argument, the legal conclusions of counsel, the facts do not disclose that the third person, even if she had accepted the solicitation and acted upon it, was to sound the juror as to his susceptibility to bribery.

Counsel at page 19 of his brief states:

> "Neither are cases controlling, even if correctly decided, which hold that an 'attempt' must be something which would have succeeded were it not for causes extraneous to the act; for when it comes to an 'endeavor' to 'influence' a juror or court, mere ground baiting or dropping the net may be enough to satisfy the statute, though to catch the fish would require more, which, in fact, was never done."

Conceding that mere ground baiting or dropping of the net, though to catch the fish would require more, constitutes an attempt, rather than a preparation to catch the fish, we query counsel, would looking at the sea to ascertain whether it was practicable to drop the net or ground bait, be preparation or attempt to catch the fish? In the instant case there was no dropping of the net and no ground baiting; there was not even a looking at the sea. At most, there was but a solicitation to have some one look at the sea.

Counsel for the Government attempts to extricate himself from the extremely disconcerting dilemma in which he is placed, perforce of his efforts to extend, at best, preparatory acts to amount to an "attempt" or "endeavor,"

by advancing two most extraordinary and novel assumptions. We quote from page 19 of his brief:

> "It must be *assumed* on demurrer that the wife would repeat the remarks to the juror—that the wife and husband are one, *pro hac vic,* and therefore that the case is the same, on demurrer, as though the defendant had made the remarks to the juror himself at his residence. On these *assumptions* the indictment must be taken to allege that the defendant went to the juror's house and inquired of him."

Counsel then continues on page 20, and says:

> "On analysis, therefore, it appears that the question in the case at bar is whether an offer to bribe a juror in a pending case is an endeavor to 'influence' him within the meaning of Section 135, Criminal Code, or an 'obstructing' or an 'impending' of justice within the meaning of the same section."

We again venture to query counsel. Assume that the indictment alleged that this conversation took place with the juror himself, and conceding for the sake of argument that this conversation established a violation of Section 135, would the verdict be sustained upon proof, on trial, that the conversation took place between the defendant and the wife, and not with the husband as alleged in the indictment? Surely, if we followed counsel's metaphysics, viz., the wife and the husband should be considered one, *pro hac vic,* "and therefore that the case is the same * * * as though the defendant had made the remarks to the juror himself," the answer must be in the affirmative, but unfortunately for counsel this case must be decided according to law and not his metaphysical pronouncements. The unity of husband and wife under the common law did not apply to criminal prosecutions. It would be just as logical to assume such a unity in all criminal offenses as is argued for by counsel in this case. One might as well carry counsel's argument to its logical conclusion and say that an assault com-

mitted upon the wife might prove an allegation of an assault upon the husband, and *vice versa,* an assault by the wife might be pleaded and proved as an offense committed by the husband; or, the State, in order to have the whole and not the half, upon conviction of the husband for murder should hang the wife as well as the husband. Even the unity of husband and wife, such as was recognized at common law, has been in the State of Illinois, as well as the other States of the Union, long since destroyed by statutory enactment.

The second count of the indictment is not limited to an endeavor, but charges the positive offense that the defendant "did corruptly influence, obstruct and impede the due administration of justices in said District Court." It contains no allegation that there was any communication by the third person with the juror, and even if we assume, for the sake of argument, that the defendant here did solicit someone not only to inquire as to the juror's attitude towards defendants, but to approach him with a bribe to favor their acquittal, and that this would sustain the charge if communicated to the juror, it would still be necessary to show that there was a communication of such offer to the juror. Unless there was such a communication the juror would have had no knowledge of the offer to bribe and there could have been no "corruptly influencing, obstructing and impeding the due administration of justice."

Counsel at page 30 of his brief states:

> "There is no repugnancy between the first count charging an endeavor to influence a juror, and the second count which charges the obstructing of justice in court, because both might have been done at the same time by the same conduct, and defendant's conduct might have delayed the Court if it did not influence the juror, and it might have influenced the juror without delaying the court."

If counsel means by this that he can conceive of a case where the defendant might accomplish both ends, at the same time and by the same conduct, we have no quarrel with him. We contend, however, that these counts are repugnant because the second count in this case is predicated upon the facts recited in the first count which shows, at most, but an abortive attempt to commit the alleged offense set up in the first count, while the second count attempts to set up a completed offense to "corruptly influence, obstruct and impede the due administration of justice."

We respectfully submit the judgment of the lower court should be affirmed.

OTTO CHRISTENSEN,
Attorney for Defendant in Error.